

UNITED STATES COMMITTEE ON INDIAN AFFAIRS

HEARING ON

“SETTING THE STANDARD:

DOMESTIC IMPLICATIONS OF THE U.N. DECLARATION

ON THE RIGHTS OF INDIGENOUS PEOPLES”

TESTIMONY OF

LINDSAY G. ROBERTSON

JUDGE HASKELL A. HOLLOMAN PROFESSOR OF LAW

UNIVERSITY OF OKLAHOMA COLLEGE OF LAW

June 9, 2011

Good afternoon, Chairman Akaka and members of the Committee, and thank you. It is an honor to have been invited to participate in this hearing.

My name is Lindsay Robertson and I am the Judge Haskell A. Holloman Professor of Law and Faculty Director of the Center for the Study of American Indian Law and Policy at the University of Oklahoma College of Law. From 2006 to 2008, I served as Private Sector Advisor to the United States delegation to the Working Group Sessions on the Draft U.N. Declaration on the Rights of Indigenous Peoples.

In addition to being a professor of law, I am a historian, and I find it difficult to think or speak about events of this magnitude without contextualizing them. I think it is important to appreciate that there is a history to the preparation of this document, which actually goes back further than the mid-1970s. This international expression resolves questions first raised in this hemisphere when the Spanish arrived in the late 15th century. The Declaration has been 500 years plus in coming, at least for us residents of the western hemisphere, and this is worth reflecting upon. Another important aspect of the construction of the Declaration is the extent to which indigenous

peoples themselves were invited to participate and did participate in the formulation of the document, which is evidenced by the strong support for the document that one sees in Indian country in the United States and indigenous communities around the world.

The drafting of the Declaration was historic, as two groups, the descendants of colonizers and indigenous peoples in the various countries of the world, came together and designed a new regime that works better and in a fairer manner for everyone, and I applaud the Committee for launching this exercise in the United States, building on the initiatives that the Obama administration has already started.

I also thought it important to say a word about the Declaration in international context. This is a comprehensive document, and it is a global document. In my capacity as a law professor, I have had the opportunity since the Declaration was adopted to travel to different parts of the world and consult in various countries on how to comply with its provisions. One finds a range of experiences. Bolivia, for instance, has simply adopted the Declaration as a statute. I might also mention Japan, to which I travelled last fall at the invitation of a committee organized to put together Japan's first statement of indigenous policy, which focuses on language and cultural rights of the Ainu people on the northern island of Hokkaido. It was extraordinary to witness the birth of a new legal relationship, and the experience helped me appreciate the ways in which the United States could act as a global leader on these issues, at least for some countries. It is not that we have done everything right, far from it. We have done a lot of things wrong. But we have done some things right, and we have done a lot of things. We have over 200 years' experience wrestling with the nature of the legal relationship between colonizers and indigenous peoples, and we have experimented with all sorts of programs that other states in the world might be considering. It is important that the United States share its experience, to the extent that information is requested, even as we are assessing it ourselves. A year and a half ago, we started at the University of Oklahoma College of Law a clinic focusing on indigenous rights worldwide, which submits reports in support of the Universal Periodic Review process at the UN Human Rights Council. We have sent teams of students out to half a dozen countries with indigenous populations that have been largely voiceless, and we have seen first hand the extent to which for indigenous peoples in those countries the Declaration is a living document, in some ways perhaps even more so than for indigenous peoples in other parts of the world whose rights are relatively more secure. We all have much to learn from one another.

Finally, I would like to share some thoughts on current and future efforts. I appreciate the Obama Administration's efforts to assist indigenous peoples in the United States in the areas of education, health, safety, infrastructure, and jobs. The Declaration provides an opportunity for

additional efforts, and I would encourage focusing on process and a reconsideration of fundamentals.

On process, I think one of the best things that came out of the Declaration and out of the Administration's aggressive engagement with these issues has been an emphasis on consultation with indigenous peoples themselves. That ought to be continued -- and expanded. I would like to see more consultation at the state level than currently occurs in many states. Inclusion of indigenous peoples in the process evidences respect, provides an opportunity for indigenous peoples to shape policy, and makes it likelier that indigenous peoples will support the result.

On reconsideration of fundamentals, first, we might look again at the nature of land rights and the distinction between different types of Indian land holdings. Aboriginal lands, executive order lands, and treaty lands are treated very differently for constitutional purposes. It is not entirely clear why. We might also look at protection and access issues relating to cultural and religious sites, which continue to be contentious. Lastly, and maybe most importantly, we might simplify self-governance. The self-governance system works here, but it is extremely complicated, built on jurisdictional rules derived from a patchwork of statutes, treaties, and Supreme Court decisions. It is confusing, limiting, unpredictable, and hard to manage on the ground. Simplification of the self-governance system would bring us closer to realizing the goals of the Declaration.

Thank you.

Lindsay G. Robertson

Judge Haskell A. Holloman Professor of Law

300 W. Timberdell Road

Norman, OK 73019